Supreme Court, U.S.
FILED
AUG 27 1999
OFFICE OF THE CLERK

No. 99-195

IN THE
Supreme Court of the United States

A.B. CHANCE COMPANY,
a subsidiary of EMERSON ELECTRIC COMPANY,
Petitioner,

v.

JERRY ALLEN ENFIELD, by and through his Conservator and Natural Mother, MAE ENFIELD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN M. KOBAYASHI, ESQ.*
SUSAN G. PRAY, ESQ.
MICHELE R. LAMONTAGNE, ESQ.
BENNETT L. COHEN, ESQ.
THE KOBAYASHI LAW FIRM, P.C.
1633 Fillmore Street
Denver, CO 80206
(303) 399-2100
Counsel for Petitioner
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

11 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
A. Petitioner Properly Preserved Its Objection to the Erroneous Jury Instruction at Issue in This Case	2
B. The Aspect of the State Law Determination at Issue in This Petition Is a Matter of Federal Appellate Practice, Which Did Not Emerge Until the Tenth Circuit Issued Its Opinion	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Bishop v. Wood, 426 U.S. 341 (1976)	5
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	*passim*
Salve Regina College v. Russell, 499 U.S. 225 (1991)	7
Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988)	6

IN THE

Supreme Court of the United States

No. 99-195

A.B. CHANCE COMPANY,
a subsidiary of EMERSON ELECTRIC COMPANY,
Petitioner,

v.

JERRY ALLEN ENFIELD, by and through his Conservator and Natural Mother, MAE ENFIELD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, A.B. Chance Company, through its indemnitor, Emerson Electric Company, and its counsel, The Kobayashi Law Firm, P.C., pursuant to Supreme Court Rule 15.6, respectfully submits this Reply Brief to Respondent Jerry Allen Enfield's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

In their Opposition Brief, Respondents raise three arguments in opposition to the Petition:

1. Respondents argue that Petitioner has waived all issues pertaining to the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938);

2. Respondents argue that the Tenth Circuit Court of Appeals correctly interpreted Kansas Law, or the Tenth Circuit's misinterpretation of Kansas law is too minor a matter to merit this Court's attention; and

3. Respondents argue that there is no split among the circuits concerning the application of *stare decisis* to *Erie*-predictive precedent.

The latter two arguments do not present any new material as contemplated by Supreme Court Rule 15.6, and Petitioners therefore will not address these issues. The argument that Petitioners have somehow waived the *Erie* issue, however, is a new matter that merits a reply. As set forth below, Petitioner properly preserved the error in the jury instruction which underlies this case. The aspect of this error which is stressed in the Petition for Certiorari—the *stare decisis* value of *Erie*-predictive precedent—is a question of federal appellate practice which is properly before this Court even though it could not have been raised in the district court, or indeed until after the entry of the circuit opinion in this case.

A. Petitioner Properly Preserved Its Objection to the Erroneous Jury Instruction at Issue in This Case.

The erroneous jury instruction underlying this Petition was instruction number 16, which saddled Petitioner with a "strict duty of care" to guard against injury to even negligent users such as the Respondent. It was submitted during trial by the City of Goodland, Kansas, only two days before the conference on jury instructions. The instruction reads:

> A manufacturer has a *strict duty of care* in design and production, *including the duty to guard against injury to ordinary and even negligent consumers.*

> If you find defendant breached this duty, you may consider it in determining the comparative fault of the parties. (emphases added)

See Appendix C to the Petition at p. 12a. As argued in the Petition for Certiorari, this "strict duty of care" instruction has absolutely no basis in Kansas law, and is in fact directly contrary to authoritative statements of Kansas law concerning absolute liability of manufacturers. *See* Petition at p. 5. This erroneous misstatement of Kansas law was spawned from *dicta* in a footnote of a federal opinion, from whence it became entrenched into the federal caselaw. *Id.* at pp. 9-12. Kansas courts have never adopted or approved of this "strict duty of care" concept. *Id.* at p. 11.

Federal Rule of Civil Procedure 51 requires that parties lodge timely and specific objections to jury instructions in order to preserve error for review:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

F.R.C.P. 51.

At the conference reviewing the jury instructions, A.B. Chance lodged the following objection to instruction number 16:

> THE COURT: Instruction Number 15: No objections.
>
> Instruction Number 16.
>
> [A.B. CHANCE]:Yes, I object to that one. [I]t states an improper standard of the duty of care. [The proper standard is] an ordinary duty of care outlined in Instruction Number 10.

> THE COURT: [I] overrule the objection to Instruction Number 16. I think it's an accurate statement of the law.

Trial transcript, 11/6/97 at p. 1128. Petitioner thus properly preserved the error in instructing the jury on the spurious "strict duty of care" as required by F.R.C.P. 51; the objection was timely, specific, and even explained to the district court the precise error in the instruction. This is precisely the sort of objection contemplated by F.R.C.P. 51; indeed, Respondent never suggested in the court of appeals that this issue was waived.

B. The Aspect of the State Law Determination at Issue in This Petition Is a Matter of Federal Appellate Practice, Which Did Not Emerge Until the Tenth Circuit Issued Its Opinion.

Acknowledging that Petitioner properly satisfied the preservation requirements of F.R.C.P. 51, Respondent argues that Petitioner failed to preserve any *Erie* issue for review because Petitioner did not raise any *Erie* arguments in the district court. Opposition Brief at 2-3. This argument is fallacious because the problem of the *Erie* doctrine's impact upon the *stare decisis* value of federal predictions of state law did not emerge and indeed could not emerge until after the Tenth Circuit issued its opinion in this case.

Petitioner's objection in the district court fully explained why the "strict duty of care" instruction was wrong: because Kansas law imposed no such duty, but rather required manufacturers to exercise ordinary care under the circumstances. There was no reason to launch into an extended discussion of the *Erie* doctrine in the district court; indeed, the district court judge would likely have found any detailed *Erie* argument to be pedantic, esoteric and useless in the context of a fast-paced and time sensi-

tive trial. Respondent's contention that Petitioner should have sought to certify the accuracy of the instruction to the Kansas Supreme Court is even more far-fetched. *See* Opposition Brief at 2. The district court judge would not likely have interrupted a long and complex trial on the eve of closing arguments to permit Petitioner to file a certification motion in order to clarify the accuracy of one instruction. No trial court would.

Rather, the district court's concern was properly limited to the narrow question of whether the "strict duty of care" instruction was an accurate statement of Kansas law. Petitioner argued that it was not and explained why; the district court overruled the objection; and the trial moved forward. That is all the preservation that is required and can be expected by the Federal Rules of Civil Procedure.

The Tenth Circuit's concern, like the district court's, was similarly focused on the accuracy of the "strict duty of care" instruction. A dissertation on the *Erie* doctrine was hardly necessary in Petitioner's appellate briefs in the Tenth Circuit, because that court was obliged to correct the erroneous instruction simply because it was erroneous. It was enough to present to the circuit court the argument and authorities that the district court ignored, which established that the concept of a "strict duty of care" is completely foreign to Kansas law, and that the instruction was erroneous. *See* Opening Brief at pp. 19, 43-44.[1]

---

1 While these reasons for correcting the district court's error in instructing on a "strict duty of care" were sufficient to raise before the district and circuit courts, this Court has announced that it generally will not use its certiorari power to review questions of the accuracy of federal interpretations of state law. *See Bishop v. Wood*, 426 U.S. 341, 346-47 & n.10 (1976). Thus, if the district court and the Tenth Circuit had done nothing more than make a simple mistake in interpreting Kansas law, Petitioners would not be petitioning this Court for certiorari review.

The role of the *Erie* doctrine, and the specific problem of the *stare decisis* value of *Erie*-predictive precedent did not become an issue until the Tenth Circuit issued its opinion in which it refused to examine the accuracy of the "strict duty of care" instruction, but instead blindly deferred to its prior precedents in which it held that the "strict duty" concept appeared to be a close enough approximation of Kansas law to serve until express correction arrived from the Kansas courts. *See* Appendix A to the Certiorari Petition at p. 7a; *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1412-13 (10th Cir. 1988). It was precisely because the Tenth Circuit rationalized the district court's error through thoughtless adherence to its own *Erie*-predictive precedent that the *stare decisis* value of *Erie*-predictive precedent has emerged as the central issue in this Petition for Certiorari, and makes this case worthy of certiorari review by this Court. This aspect of the jury instruction was not discussed until the Petition for Rehearing for the obvious reason that it did not emerge as an issue until that point.

Once this *Erie* issue had emerged, Petitioner promptly filed a Petition for Rehearing in the Tenth Circuit which argued that the court's deference to its own inaccurate *Erie*-predictive precedent was both a violation of *Erie* and of fundamental principles of *stare decisis*. The Tenth Circuit again did not seriously consider this argument, but denied the Petition for Rehearing in a *per curiam* order.

The underlying error at issue in this case is and has always been the accuracy of the "strict duty of care" instruction, to which Petitioner properly objected and preserved for review. The specific *aspect* of this issue which is the focus of the Certiorari Petition—the Tenth Circuit's sacrifice of *Erie* values on its altar of *stare*

decisis—could not be raised in the district court because it is a matter of federal appellate practice.

This Court reviewed an issue in the exact same procedural posture in *Salve Regina College v. Russell*, 499 U.S. 225 (1991). Like here, the issue underlying the certiorari petition in *Salve Regina College* was the accuracy of the district court's determination of state law. The aspect of this question which this Court considered on certiorari review was the appropriate standard of review which the circuit courts should apply to the district court's state law determinations. This aspect of the state law determination obviously could not have been raised in the district court because it did not even exist until the circuit court had completed its appellate review and issued its opinion.

The certiorari issue in *Salve Regina College* was thus a question of federal appellate practice, which arrived at this Court through the vehicle of a district court determination of state law. Petitioner presents an identically-postured issue of federal appellate practice. Indeed, Respondent's absurd waiver argument would preclude this Court from reviewing any issues of federal appellate practice, because objections to such issues cannot be raised in the district court.

CONCLUSION

For the above reasons, the waiver argument in Respondent's Opposition Brief is utterly without merit, the Petition for Writ of Certiorari should be granted and a Writ of Certiorari should be issued.

Respectfully submitted,

JOHN M. KOBAYASHI, ESQ.*
SUSAN G. PRAY, ESQ.
MICHELE R. LAMONTAGNE, ESQ.
BENNETT L. COHEN, ESQ.
THE KOBAYASHI LAW FIRM, P.C.
1633 Fillmore Street
Denver, CO 80206
(303) 399-2100
Counsel for Petitioner

August 27, 1999

* Counsel of Record